

## Commentary on Application of Tennessen & Garrity Notices during Investigations

Counties conducting personnel investigations, including investigations of employee misconduct, should be familiar with the appropriate application and use of the Tennessen advisory and *Garrity* advisory. This article provides an overview and brief commentary on both. Additional notice the employer should review in relation to investigatory interview processes includes Weingarten; and for law enforcement investigations, the Peace Officer Discipline Procedures Act advisory. The latter two topics are not discussed in this article.

### Tennessen Advisory:

Tennessen advisories, also referred to as Tennessen warnings, are required by Minnesota state law when a government entity will be requesting private or confidential data from an individual. This requirement can be found in Minnesota Statute 13.04, Subd. 2. An individual asked to supply private or confidential data must be informed of the following information through the Tennessen advisory:

- The purpose and intended use of the requested data;
- Whether the individual may refuse or is legally required to supply the requested data;
- Any known consequences arising from supplying or refusing to supply the private or confidential data; and
- The identity of other persons or entities authorized by state or federal law to receive the data.

Counties should provide a Tennessen advisory in both compelled and voluntary investigative interviews. It is recommended that the County provide a Tennessen advisory whenever interviews are conducted regarding possible misconduct by an employee, as part of an investigation process. The Tennessen advisory is required when an individual is asked to provide private or confidential data about himself or herself.

### *Garrity* Advisory:

*Garrity* advisories, also referred to as *Garrity* warnings, are used to place a government employee on notice that they must cooperate in an investigative interview under threat of discipline or discharge for failure to comply, thus making their cooperation in the interview *compelled*. The *Garrity* advisory also informs the employee that any information obtained during the compelled interview, and any evidence resulting from the information provided, cannot be used against the individual in any subsequent criminal proceedings. The *Garrity* advisory arises out of a United States Supreme Court decision in *Garrity v. New Jersey*, 385 U.S. 493 (1967) and relates to Fifth Amendment rights under the Federal Constitution regarding self-incrimination.

A government employer may require or compel an employee to provide a statement during an investigation interview, including information that may be self-incriminating, as long as the employee is provided the *Garrity* advisory assurance that the statement and evidence derived from it will not be used against the employee in criminal proceedings. The *Garrity* advisory allows a government employer to *require* that the employee respond to its investigation questions, while also protecting the employee's right against self-incrimination in any subsequent criminal proceeding.

The *Garrity* advisory should include the following information:

- The employee is not required by law to provide any information.

- The employee should provide truthful answers if he or she chooses to answer.
- The employee may be disciplined or discharged if he or she declines to answer the employer's questions truthfully, accurately and fully, or refuses to cooperate with the interviewer.
- Any information provided during the interview will not be used against the employee in a subsequent criminal proceeding.

*Garrity* advisories should only be used when a County intends to compel an employee to respond to investigative interview questions under threat of discipline or discharge for failing to comply.

The *Garrity* advisory assures the individual being interviewed that the information they provide will not be used against that individual in a criminal proceeding. However, information obtained through a compelled statement by an employee-witness may be used against the subject of the investigation in a criminal proceeding. The protection and assurance provided by the *Garrity* advisory is only that data resulting in *self-incrimination* cannot be used in a criminal proceeding.

Considerations Regarding Use of *Garrity* Advisory versus Tennessean Advisory:

- The decision about whether to issue a *Garrity* advisory is to be determined by the County and is not a choice for the employee to make.
- When there is a possibility that investigative interview data collected from the subject of the investigation may be used in subsequent prosecution of a crime against that individual, conducting a *voluntary interview* utilizing just a Tennessean notice may be preferred. Consider that if a *Garrity* advisory is given, the information gathered **cannot** be used in subsequent criminal proceedings.
- If the employer provides a Tennessean advisory and proceeds with a voluntary interview, but the employee elects not to provide a voluntary statement, the County has the option to proceed with the investigation and make its determinations based on the information available, and without any information that this employee may be able to provide. Alternatively, the County may decide to reconvene the interview and issue a *Garrity* advisory in order to compel a statement at that point in the investigation process.
- When conducting an investigation in which it is clear the subject matter would not result in any criminal charges based on the nature of the allegations, there is no legal downside to using the *Garrity* advisory either for the subject of the investigation or an employee-witness. (*Garrity* advisory is not applicable when interviewing non-employees.)
- When considering whether to issue a *Garrity* advisory and compel participation in the interview however, the County may wish to consider additional factors including the tone set when an employee is required to provide a statement under threat of discipline or discharge, whether the County is prepared to follow through with discipline/discharge in the event the employee still opts not to comply, the influence of this approach on union relations, and also the County's past practice and approach in similar situations.
- When potential criminal conduct is alleged, or when it becomes apparent there may be potential criminal conduct involved, it is advisable to consult with appropriate legal counsel before proceeding with administering a *Garrity* advisory.

Tennessean Advisory and *Garrity* Advisory Templates:

Several different investigatory interview notice formats are provided for County use through the **AMC Human Resources Technical Assistance Program Knowledge Base**. You will find both *Tennessee* and *Garrity* advisories below, tailored for use when interviewing both the subject of the investigation as well as for use with non-subject, or witness interviews. In addition, we provide a combination document that allows an interviewer who is knowledgeable with regard to appropriate application of *Garrity* versus *Tennessee*, to easily check a box on the form indicating whether a voluntary or compelled statement is applicable for the interview. This allows use of a single template, in multiple scenarios.

Document prepared by DDA Human Resources, Inc.

